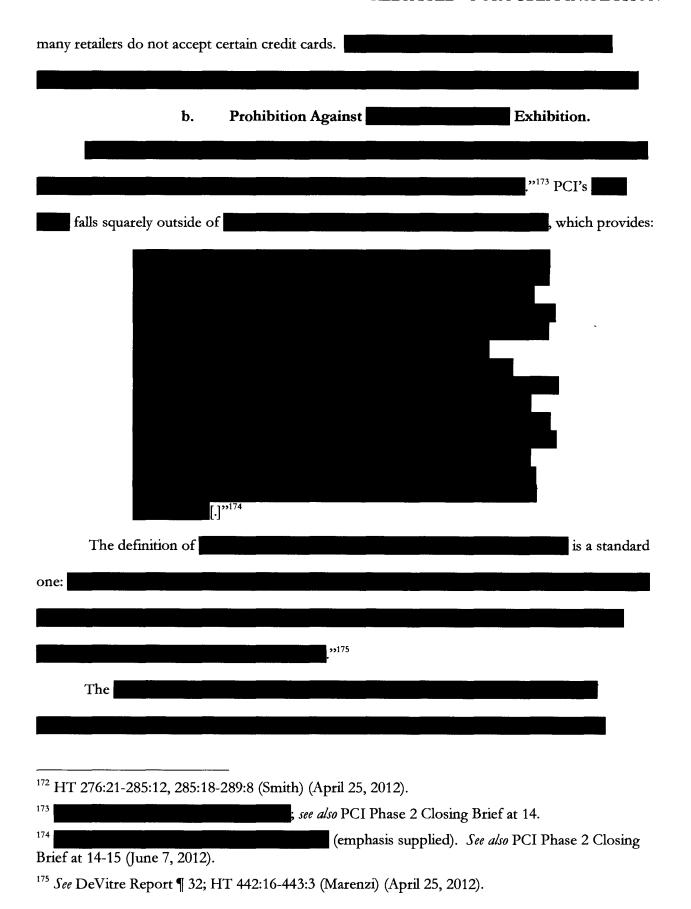


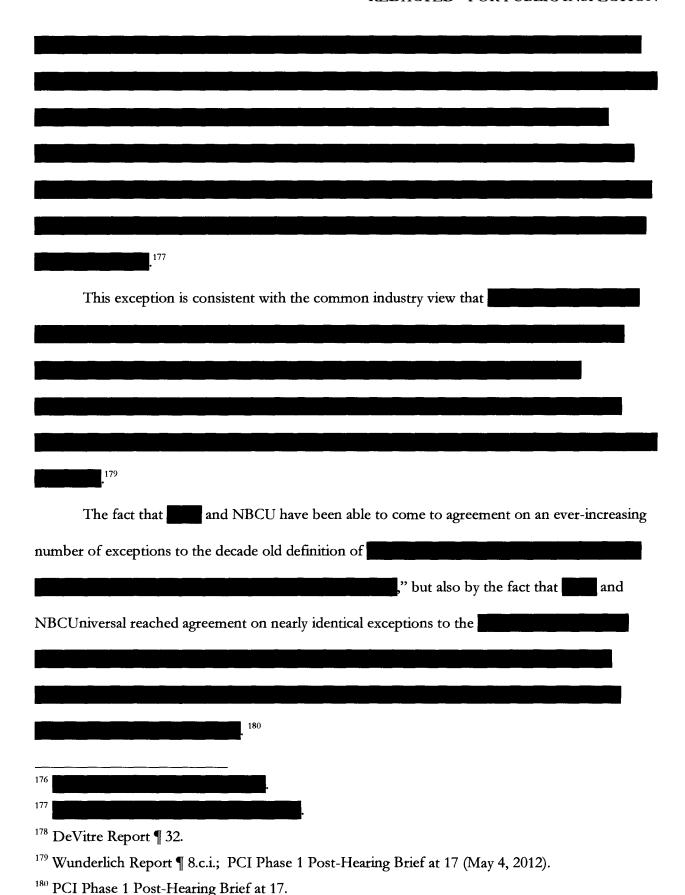
<sup>;</sup> HT 333:19-336:11 (Smith); 396:19-397:2 (Peyer).

 $<sup>^{169}</sup>$  NBCU Final Offer § 4(z).

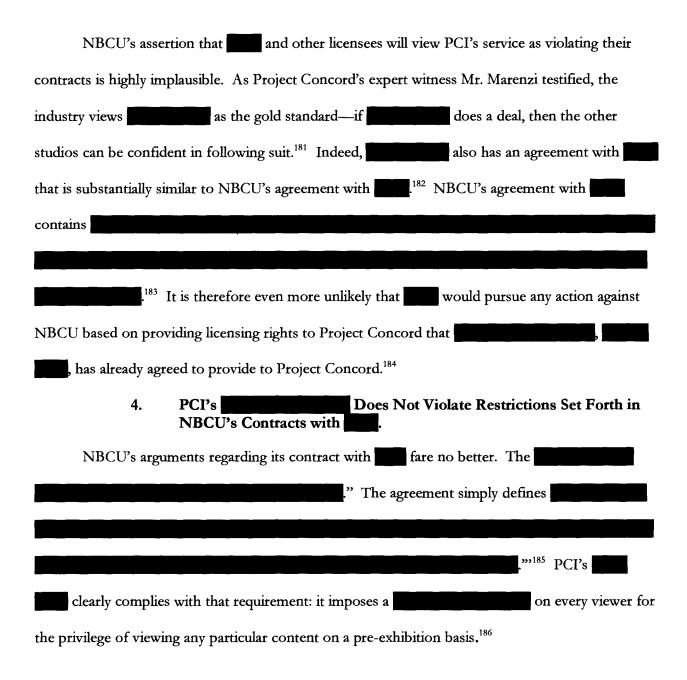
<sup>&</sup>lt;sup>170</sup> NBCU Petition at 31 and at note 92.

<sup>&</sup>lt;sup>171</sup> Madoff Sec. Decl. at ¶ 4; HT 755:20-757:5 (Wunderlich) (May 30, 2012).





<sup>46</sup> 



<sup>&</sup>lt;sup>181</sup> HT 433:2-12 (Marenzi) (April 25, 2012).

 $<sup>^{182}</sup>$  Phase 1 Devitre Exp. Rep.  $\P$  34; HT 506:7-507:4. (DeVitre) (April 25, 2012).

 $<sup>^{183}</sup>$  Phase 1 DeVitre Exp. Rep.  $\P$  36; HT 489:1-22 (DeVitre) (April 25, 2012).

<sup>&</sup>lt;sup>184</sup> HT 462:10-463:8 (Marenzi); HT 509:11-510:17, 532:11-534:3 (DeVitre) April 25, 2012).

<sup>&</sup>lt;sup>185</sup> Mad. Sec. Decl. ¶ 14, quoting

<sup>;</sup> PCI Phase 2 Closing Brief at 16 (June 7, 2012).

5. PCI's Does Not Violate Restrictions Set Forth in NBCU's Other Contracts.

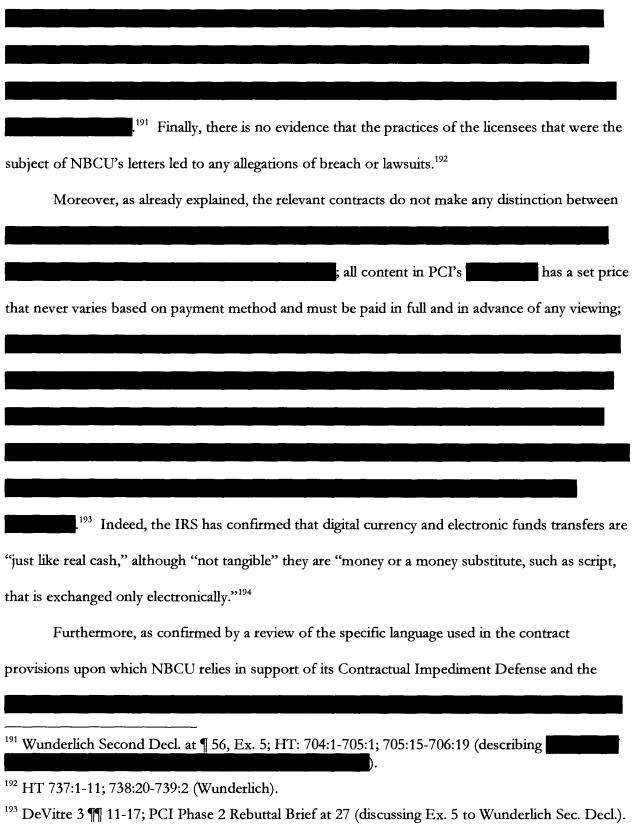
With respect to TV shows, NBCU similarly contends that
. 187 With
respect to its NBCU stated on the record that Internet distribution is
restricted to those services that
. <sup>188</sup> With respect to its non-exclusive TVOD/EST
agreements with other OVDs, NBCU stated that they typically require that
»189
Again, the Project Concord falls squarely within all of these contract restrictions.
Those contracts require — as also required
by Project Concord. None of these agreements look to the
to satisfy all of these requirements. 190
Nor is there any evidence that

<sup>&</sup>lt;sup>187</sup> See NBCU Petition at 37.

<sup>&</sup>lt;sup>188</sup> See Project Concord Inc., Claimant vs. NBCUniversal Media, LLC, Respondent. Case No. 72-472-E-01147-11, Post Hearing Brief of NBCUniversal Media, LLC, at 24-26 (dated May 3, 2012) ("NBCUniversal Phase 1 Post-Hearing Brief").

<sup>&</sup>lt;sup>189</sup> NBCUniversal Phase 1 Post-Hearing Brief at 27; PCI Phase 2 Closing Brief at 17 (June 7, 2012).

<sup>&</sup>lt;sup>190</sup> PCI Phase 2 Closing Brief at 17 (June 7, 2012).



<sup>&</sup>lt;sup>194</sup> Internal Revenue Service, Cash Intensive Business Audit Techniques Guide, Chapter 7, <a href="http://www.irs.gov/businesses/small/article/0,.id=210735,00.html">http://www.irs.gov/businesses/small/article/0,.id=210735,00.html</a>, last visited June 7, 2012.

from them.<sup>195</sup>

In summary, as demonstrated by the evidence, including a review of NBCU's contracts with its licensees, review of the testimony presented by fact witnesses and experts, and a review of Project Concord's service, it is clear that

— and a transfer from a PayPal digital account suffices, an electronic debit from a credit card suffices and an electronic transfer of money from a customer's Project Concord account suffices. Accordingly, the Arbitrator properly concluded that NBCU failed to carry its burden of proving its Contractual Impediment Defense. 196

#### 6. Risk of Breach is Further Mitigated by Actual Industry Practice.

It is important to emphasize that it is NBCU that has preferred, throughout the course of the Arbitration, to argue that it simply does not matter what its contracts with others actually say -- all that really matters is what NBCU thinks its licensees might think about PCI's service when it from now. 197 As Project Concord has consistently underscored, such premature speculation does not (and cannot) satisfy NBCU's burden of showing by a preponderance of *evidence* that providing Comparable Programming to PCI's service would violate any contract that it actually has with a third party.

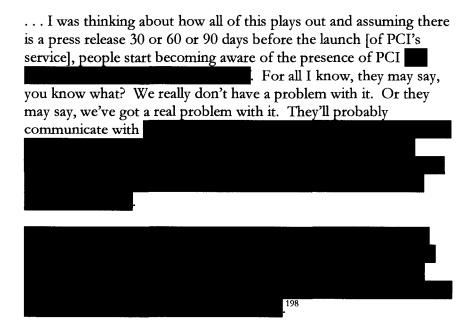
Project Concord pointed to the testimony of NBCU's own expert witness in countering NBCU's speculative claims regarding how its licensees might react to NBCU's provisioning of

 $<sup>^{195}</sup>$  DeVitre 3  $\P$  19; HT 913:12-915:14 (DeVitre) (May 31, 2012); see also PCI Phase 2 Closing Brief at 14-17.

<sup>&</sup>lt;sup>196</sup> Arbitration Award at 3, 10.

<sup>&</sup>lt;sup>197</sup> See, e.g., NBCU Phase 2 Opening Statement at 11, 21-22.

current programming to Project Concord, who opined that if a question did arise from a licensee, the more likely scenario is the following:



The Arbitrator stated that this testimony was emblematic of "the degree of speculation involved in NBCU's defense," and that such "speculative opinion testimony

is glaringly inconsistent with the preponderance of the evidence burden which NBCU must carry." 199

What Mr. Madoff's testimony is consistent with is what the evidence reflects regarding industry practice - when studios find or develop a distribution model that enhances their ability to make money on their content, they work with their licensing partners to make room for that distribution.<sup>2(N)</sup> Consistent with common sense, this works to everyone's advantage: studios that are

<sup>&</sup>lt;sup>198</sup> HT: 847:13-848:10 (Madoff).

<sup>&</sup>lt;sup>199</sup> Arbitration Award at 9 (emphasis supplied).

HT 960:4-961:15 (DeVitre) ("They work out their differences. And that, by the way, is evident by the way where, especially in the advent of digital rights and the proliferation of online video distribution, there have been quid pro quos between and the studio to allow the studio to further exploit its product in new ways as older ways are beginning to wane.").

making money generate more content for distribution, and distributors make more money for studios because they have more product to sell.<sup>201</sup>

There is no evidence in this record that any licensee has ever from NBCU as the result of a perceived rights conflict. Instead, it appears that, to the extent that there is any claimed conflict between licensees' rights or inconsistencies between what a licensee is doing and what NBCU believes it should or should not be doing, the common (and not infrequent) practice of NBCU is potential breaches demonstrated that (1)

202 For example, the evidence of potential breaches demonstrated that (1)

Indeed, in Phase 2, NBCU's expert Wunderlich could not and would not quantify the risk of NBCU being sued for breach. Of course, NBCU keeps leaving out all of the evidence about what actually happens in the industry when a question arises, because when taking this into account, as the Arbitrator did, the risk of breach becomes even lower.

### V. IT IS INAPPROPRIATE TO USE THE APPEAL PROCESS TO REQUEST RECONSIDERATION OF THE CNBCU ORDER.

NBCU raises a third issue, which it couches as a "procedural ambiguity" that requires "clarification" – whether contract defenses should be considered in phase 1 or phase 2 of the arbitration proceedings.<sup>204</sup> Actually, the Conditions are unambiguous on this point: "the first phase

<sup>&</sup>lt;sup>201</sup> HT 960:4-961:15 (DeVitre).

<sup>&</sup>lt;sup>202</sup> See, e.g., Wunderlich Second. Decl.; DeVitre 2 at ¶ 29; DeVitre 3 ¶ 16. See also HT 911:11-912:5 (DeVitre) (describing typical process at for resolving conflicts); 980:3-21 (describing 31, 2012).

<sup>&</sup>lt;sup>203</sup> HT 735:13-739:3 (Wunderlich ultimately answers that he is not aware of allegation of breach of any of the agreements he analyzed that ultimately made it a lawsuit stage).

<sup>&</sup>lt;sup>204</sup> NBCU Petition at 42.

shall concern defenses based on 47 C.F.R. sec. 76.1002 (b)(1) only."<sup>205</sup> Obviously, the word "only" means that no other defenses should be considered in Phase 1. NBCU would now like the Commission to interpret "only" as meaning "and" – or in other words, "not only."<sup>206</sup>

In order to reach the point of contract formation as quickly and cost-effectively as possible, PCI agreed to allow Respondent's defense under sec. VII.C.3(ii) to be considered and determined in the Phase 1 proceedings.<sup>207</sup> As a result, NBCU had two opportunities (in both phase one and phase two) to attempt to prove, by a preponderance of the evidence, its contractual defenses. Despite two bites at the apple, the arbitrator ultimately concluded that NBCU did not meet its burden.

A "clarification" regarding the unambiguous meaning of the word "only" does not impact
Project Concord's victory on the legal issues that NBCU is appealing. It is inappropriate for NBCU
to use this appeal process to now request a late reconsideration of the language in the Conditions. If
the Commission chooses to reopen this narrow issue, it is more appropriate to do so in the context
of an open proceeding with full opportunity by all interested parties to participate, particularly
because the outcome has no bearing on this proceeding.

\*\*\*\*

#### VI. CONCLUSION.

The Commission, in permitting Comcast to acquire NBCUniversal Media, found that without Conditions the combined Comcast-NBCU would have the "incentive and ability" to behave

<sup>&</sup>lt;sup>205</sup> Section VII.C.1 of the Conditions provides that this "arbitration shall take place in two phases if there is a reasonable dispute regarding one or more of the following: (i) whether an OVD is a Qualified OVD; (ii) what Comparable Programming a Qualified OVD is entitled to...; and (iii) whether any of the defenses in Section VII.C.3 below would defeat a claim (provided that, with respect to Section VII.C.3, the first phase shall concern defenses based on 47 C.F.R. § 76.1002(b)(1) only)." Section VII.C.1 goes on to provide that, "[i]n phase 1, the arbitrator shall determine, as applicable, the disputes raised in sub-paragraphs (i) through (iii)." (emphasis supplied).

<sup>&</sup>lt;sup>206</sup> NBCU Petition at 43.

<sup>&</sup>lt;sup>207</sup> See PCI Opening Brief (April 17, 2012) at 2-3, n.4.

anti-competitively by withholding NBCU content from emerging online competitors such as Project Concord. It turns out that the Commission's predictions were exactly right.

The Conditions require that if a qualified OVD has an agreement with a Film Studio for Video Programming, "C-NBCU shall provide online video programming sought by the OVD that constitutes Comparable Programming." Project Concord has entered into an agreement with a peer Film Studio to distribute a broad array of Video Programming, including films within a year of theatrical release. NBCU must accordingly provide "Comparable Programming" to Project Concord, including films within a year of theatrical release.

Despite these straightforward obligations, NBCU refused to comply. The Arbitrator, after reviewing an extensive record, concluded that Comcast was wrong on every substantive issue. No, the Conditions do <u>not</u> exclude films within a year of theatrical release, the very content necessary to make an OVD competitive. And no, NBCU did <u>not</u> show (much less by a preponderance of the evidence) that there was any contractual impediment to providing such programming to Project Concord.

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<sup>&</sup>lt;sup>208</sup> Sec. IV.A.2.B.

NBCU continues to resist providing content to Project Concord, despite its straightforward obligations under the Conditions, and despite an Arbitration Award finding that NBCU was wrong on every issue it raised. Enough is enough. For all the foregoing reasons, the Commission must deny NBCUniversal's Petition in total and affirm the reasoned and well-supported Arbitration Award.

Respectfully submitted,

Project Concord, Inc.

By:

Monica S. Desai Kevin J. Martin Paul C. Besozzi Patton Boggs LLP 2550 M Street, N.W. Washington, D.C. 20037

(202) 457-6000

Dated: July 31, 2012

### Declaration of Lawrence Smith

Exhibit 1

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## Claimant's Phase 1 Proposed Findings and Conclusions

Exhibit 2

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# Claimant's Phase 2 Proposed Findings Exhibit 3

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### **CERTIFICATE OF SERVICE**

I, Yosef Getachew, certify that, on this 31st<sup>th</sup> of July, 2012, a copy of the foregoing "Project Concord, Inc. Opposition To NBCU " has been served by hand delivery or electronically and first-class mail, postage pre-paid, on the following:

Sarah Whitesell Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554	Steven Broeckaert Federal Communications Commission 445 12 <sup>th</sup> Street, SW Washington, D.C. 20554
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Yosef Getachew